IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO.584 OF 1991

Sunita Achut Joshi ...Appellant
Vs.
Gopal Kanhayyalal Vasita & Ors. ...Respondents

Shri T.J. Mendon for the Appellant.
Shri M.R. Katikar for the Respondent Nos.1 and 2.
Shri S.M. Dange for the Respondent No.3.

CORAM : ABHAY S. OKA, J.

DATE ON WHICH JUDGMENT IS RESERVED : APRIL 18, 2006.

DATE ON WHICH JUDGMENT IS PRONOUNCED: JUNE 08, 2006.

JUDGMENT:

1. The Appellant in this First Appeal is an unfortunate claimant in a claim for compensation filed under Section 110A of the Motor Vehicles Act, 1939 (hereinafter referred to as the said Act of 1939). In a motor accident, the Appellant has lost her husband. However, the Claim Petition filed by the Appellant has been dismissed on the ground that though the death arising out of accident involving use of a motor vehicle was proved, the Motor Accident Claims Tribunal found that it was a case of an inevitable accident.

2. It will be necessary to refer to the facts of the case in brief. The Appellant is the widow of one Achut Joshi. The Respondent No.1 is the driver of Truck No.MTT 9283 which was at the relevant time owned

by the Respondent No.2. The truck was validly insured with the Respondent No.3 at the time of accident. The age of the deceased at the time of death was thirty-nine years and he was serving as a Manager with the Valcan Lavel Ltd., Chinchwad, Pune. On 22nd December, 1981 the deceased was travelling from Pune to Bombay in a taxi for his official work. When the taxi came near Konkan Bhavan on Pune-Bombay Road while climbing an ascent, due to oil spread over the road the taxi skidded and went towards the right side of the road. The taxi fell down in a ditch on the right of the road. Miraculously, no one sustained injuries. The taxi driver and deceased alighted from the taxi and came up on the road. By the time the deceased climbed up and came on the road, the truck which was driven by the Respondent No.1 came from the side of Pune. The said truck also skidded and turned towards its right side. The truck gave a fatal dash to the deceased. The truck also fell down in the ditch in same manner as the taxi. The deceased was taken to a hospital where he succumbed to the injuries. As stated earlier, the Claim Petition was dismissed on the ground that no negligence on the part of the Respondent No.1 could be established as the death occurred due to inevitable accident which was beyond the control of the Respondent No.1.

3. Shri Mendon learned Advocate appearing for the Appellant/Claimant submitted that the jurisdiction of the Tribunal established under the Motor Vehicles Act, 1939 is not restricted to claims arising out of negligence in the use of motor vehicles. He submitted that even if there is no negligence on the part of the driver of the truck, the owner is liable to pay compensation. He submitted that said jurisdiction vests in the Tribunal apart from jurisdiction to grant compensation under the provisions relating to no fault liability. He placed reliance on decision of the Apex Court reported in 2001 A.C.J. Page 428 (S.C.) in the case of Kaushunuma Begum and Ors. Vs. New India Assurance Company Ltd. & Ors. He also placed reliance on another decision of the Apex Court reported in 1987(3) Supreme Court Cases Page 234 in the case of Gujrat State Road Transport Corporation Vs. Ramanbhai & Anr. He relied upon a decision of the Apex Court reported in 2000 (2) T.A.C. 213 (S.C) in the case of Smt Ritadevi and Ors. Vs. New India Assurance Company. He submitted that even assuming that oil was spilled over the road, it was the obligation of the Respondent No.1 to properly observe the condition of the road ahead of him and to stop vehicle instantaneously. He submitted that the

Respondent No.1 has failed to take care as any person of ordinary prudence would have taken in the circumstances and therefore, there was negligence on the part of the Respondent No.1.

4. Shri S.M. Dange the learned Advocate appearing on behalf of the Respondent No.3-Insurance Company submitted that the case of the Appellant is not covered by the decision of the Apex Court in the case of Kaushnuma Begum. He submitted that the accident occurred as a result of act of God or vis major. He, therefore, submitted that the learned Trial Judge was right in dismissing the claim. On merits he submitted that the Respondent No.1 had no opportunity to avoid the accident considering the location and the nature of the road. He submitted that the truck was not the only vehicle which skidded and in fact taxi in which deceased was travelling also skidded in the same manner few minutes before the skidding of the truck. He submitted that in no way the driver of the truck could have prevented the accident. The learned Advocate appearing for the Respondent Nos.1 and 2 supported the impugned Judgment and Award.

5. After submissions of the Advocates appearing

for the parties were substantially heard on 27th March, 2006, I suggested to the Advocates appearing for the parties to ascertain whether there was any possibility of amicable settlement considering the fact that in a fatal accident the widow of the deceased was denied compensation. On 31st March, 2006 the learned Advocate appearing for the Respondent No.3-Insurance Company stated that he tried his level best to explore the possibility of settlement by contacting concerned Office of the Respondent No.3 at Thane. He stated that he even attempted to contact the concerned Regional Manager of the Respondent No.3. He stated that concerned Officer of the Insurance Company in its office at Thane informed him that as per the policy of the Respondent No.3- Company, after a Claim Petition is dismissed by the Motor Accident Claims Tribunal, a proposal for amicable settlement is not considered as there is always likelihood of audit objections being raised. I directed that the concerned Officer of the Respondent No.3- Insurance Company should remain present in this Court. Accordingly, Shri K.Ravishankar Regional Manager of the Mumbai Regional Office-I of the Respondent No.3 attended this Court on 07th April, 2006. He filed an affidavit in which he stated as under:

"3. I further say that it is a practice followed by Public Sector Insurance Institute like ours that after the claim is dismissed by Hon'ble Motor Accident Claims Tribunal, no compromise settlement can be authorized by officials of New India, as such compromise settlement proposals are subject to critical scrutiny and objection by the Government Auditors appointed by the Comptroller and Auditor General of India and also Statutory Auditors who are also appointed by the Comptroller and Auditor General of India. Further the Internal Auditors of the New India Assurance Co. Ltd. also take serious objection to any such compromise settlement proposals by New India officials especially when the claim was dismissed by Hon'ble Tribunal.

4. The Company believes such long standing standard practices have always worked in the best interests of the New India Assurance Co. Ltd., the Government of India undertaking, in order to protect the public funds.

> . Further these practices have also brought about discipline and uniformity amongst officials serving in various Regional Offices and Divisional Offices spread all over India.
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> 5. We submit to Hon’ble High Court that we at the new India Assurance Co. Ltd. shall always abide by the Award as may be issued by your Lordship."

I have dealt with this aspect of the case in later part of this judgment. Though the learned Advocate for the Respondent No.3 did his best as an officer of the Court to explore the possibility of settlement, no progress was made in that behalf in view of the aforesaid policy of the Insurance Company. Therefore, I allowed the Advocates to complete the submissions on merits.

6. For appreciating the submissions made by the Advocates appearing for the parties, it will be necessary to refer to the evidence on record. The Appellant has deposed about the members of her family and the income which was being received by the deceased. The evidence of the Appellant is not

relevant in so far as the aspect of negligence is concerned. The Appellant has examined Sadashiv Haribhau Padare at Exhibit 77 who was the driver of the taxi in which the deceased was travelling on the fateful day. He stated that he was plying his taxi from Bombay to Pune and he had a permit to ply the taxi. In his evidence, he stated that the accident took place near Konkan Bhavan on Pune-Bombay Highway. The Konkan Bhavan was two kilometres behind the place of accident. He stated that his taxi came on top of a hill. As there was oil on the road, taxi skidded and it went to right side of the road and it fell in ditch. He stated that nobody was injured in the accident. He alongwith the deceased alighted from the taxi and came on the road. He stated that deceased was on extreme end of the road as he had just reached the road after getting out from the taxi. At that time the truck driven by the Respondent No.1 came from Pune side. He stated that the truck also skidded due to the oil spread on the road and came to the right side and gave a dash to the deceased. He stated that he took the deceased in a private taxi to a hospital at Vashi. The doctor concerned in that hospital advised him to shift the deceased to Sion hospital at Mumbai. The witness brought an ambulance for taking the deceased to the hospital at Sion. In the

meanwhile, the deceases succumbed to injuries sustained in the accident. He stated that he could see the oil on the road when his taxi was about 10 to 15 feet away from the spot. He stated that the oil was visible. According to him the truck was empty. In the cross-examination he stated his taxi fell down in the ditch having depth of 40 feet. He stated that two minutes after taxi fell down, the occupants of the taxi came on the road. He admitted that his taxi fell in the ditch only because of oil on the road. The Appellant examined one Madhav Wamanrao Kekane, an Officer of employer of the deceased. The said witness was examined to prove the income of the deceased and to bring on record the future prospects of the the deceased in the employment.

7. The Respondent No.1 driver stepped into witness box. He stated that after crossing Konkan Bhavan, there is an ascent and there is curve from right to left and again to the left. He stated that he was driving the truck at the speed of 20 kilometre per hour in second gear. He stated that while driving the truck it skidded and went into a ditch which was 40 feet in depth. He stated that one man was climbing the slope and the truck gave a dash to him. He stated that it was the month of December and there was a fog

and therefore, he could not see the oil on the road. He stated that the oil was on the road in the patch of nearly 80 to 90 feet in length. He stated that he came to know about the oil when he climbed up. In the cross-examination he stated that he was dismissed from the service by the Respondent No.2. He stated that one Mama was the cleaner-cum-labourer was in the truck at the relevant time. In cross-examination he admitted that accident took place at about 11.30 a.m. He, however, denied the correctness of the suggestion that there was no fog on the road. He stated that while going from Konkan Bhavan towards Bombay there is an ascent up to a point and thereafter there is a slope. He admitted that the accident took place at the point where the ascent ends. He denied that his truck went on the wrong side. He however admitted that both the vehicles had fallen on the right side.

8. The Respondent No.2 who was the owner of the offending truck at the relevant time was also examined. He placed on record a copy of the Insurance policy of the truck. He stated that he had dismissed the Respondent No.1 from service. He, however, denied that he dismissed the Respondent No.1 from service as he drove the truck rashly and negligently. One Suhas Gajanan Karve an officer of the Respondent No.3

-Company was examined who produced the record of policy of Insurance. He stated that though truck was validly insured with the Respondent No.3-Insurance Company at the time of accident, the liability of Insurance Company was restricted to Rs.50,000/- as extra premium to cover unlimited liability was not paid by the insured.

9. Now the evidence will have to be analysed after taking into consideration the documentary evidence on record. The scene of offence panchnama is at Exhibit 43. The panchnama records that on the road there was a liquid of black colour like oil. It is stated in the panchnama that the width of the pacca road is 24 feet. At Exhibit 92 is true copy of renewal notice issued to the Respondent No.2. The renewal notice records that limit of liability of the Respondent No.3 is Rs.50,000/-.

10. A reference will have to be made to decision of the Division Bench of this court in the case of Shakuntala Shetty Vs. State of Maharashtra (1976 A.C.J. Page 368). The Division Bench of this Court in the said decision held that the burden of proving the defence that the accident was an inevitable accident is always on the concerned Defendant. In

paragraph Nos.18 to 21 of the said decision the Division Bench has observed thus:

> "18. **There can be no doubt that a person in the control of a motor vehicle must keep a good look-out in all the directions of the road, on the sides and in front of him** and if he does so it would naturally be expected that he would be able to notice a person walking or riding a cycle right in front of him.
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> 19. It requires to be stated that having noticed another user of the road, whether in the form of a pedestrian or a cyclist or another vehicle, in front of him, (whether going in the same direction or in the opposite direction) it at once becomes the duty of the driver of the vehicle to adjust the speed of his vehicle in such a manner that it comes under his complete control and he may stop it instantaneously in case of necessity so as to avoid an accident.
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> 20. These observations of various Courts clearly set out the nature of the duty to care as well as the standard of care expected from the driver of a vehicle. Now, applying the

above rules to the facts of the present case, let us see if the negligence of defendant No.3 as the driver of the jeep which collided against the cycle has been established. (Emphasis supplied)

11. The Respondent No.1 in his examination-in-chief came out with the case that as the accident occurred in month of December, there was a fog and therefore he could not see the oil spilled over the road. In fact this is the only reason given by the Respondent No.1 for not noticing the oil spread over the road ahead of him. In the cross-examiation he admitted that incident took place at about 11.30 a.m. Sadashiv Padare, witness No.2 examined by the Appellant is admittedly an eye-witness. He was the driver of the taxi in which the deceased was earlier travelling. In the examination-in-chief he stated that the he could see the oil on the road from a distance of ten to fifteen feet. In his cross-examination no suggestion whatsoever has been given that at 11.30 a.m. on that day there was a fog as a result of which the visibility was reduced. Not only that the Advocate appearing for the Respondents has not given the suggestion to the said witness of the Appellant, but no independent witness has been

examined to show that there was a fog at 11.30 a.m. Apart from the fact that it is difficult to believe that at 11.30 a.m. in this area falling in Thane district near Mumbai there was a fog, the case made out by the Respondent No.1 regarding existence of fog appears to be an afterthought. The Respondent No.1 has deposed that one taxi had also fallen in the ditch at the distance of 20 feet from the truck. There was one person by name Mama who was admittedly in the truck as a cleaner-cum-labourer. No attempt is made to examine the said person as a witness. It is stated by the Respondent No.1 that accident took place in the place called the 'khind'. According to his version there is an ascent up to the 'khind' and from the 'khind' there is a slope. Going by the version of the Respondent No.1, the oil must have been spread on the ascent towards the khind. It is, therefore, very difficult to believe that the Respondent No.1 could not see the oil on the road while ascending towards the khind. Initially, in the cross-examination the Respondent No.1 denied that his truck went on wrong side. However, in the cross-examination he admitted that the truck fell down in a ditch which is on the right hand side of the road. The driver of the taxi has deposed that oil was visible from a distance of 10 to 15 feet. The version of the Respondent No.1 that

he could not see the oil spilled over the road due to fog has to be disbelieved. Careful perusal of the examination-in-chief of the Respondent No.1 shows that he has not specifically stated that he had kept a vigil and notwithstanding the vigil he could not see the oil spilled over the road till the time the truck skidded. It is not the case of the Respondent No.1 that deceased had come at centre of the road. Even according to his version the deceased had just climbed up on the road when the truck gave dash to him. There is nothing to show from the deposition of the Respondent No.1 that he was vigilant and that he performed the duty entrusted to him of taking care by keeping a vigil. If the entire evidence is considered it is obvious that there is failure on the part of the Respondent No.1 to take care which any ordinary man of prudence in his position would have taken. The Respondent No.1 ought to have noticed the oil spilled over the road ahead of him and ought to have made efforts to stop the vehicle. It is not his case that after noticing the oil, he applied brakes. There is a complete failure on the part of the Respondent No.1 to take care which he was bound to take. The Respondent No.1 has come out with the case of fog which has to be discarded. It is thus obvious that accident occurred due to negligence on the part of the Respondent No.1.

12. Turning to the quantum of compensation, the Appellant has stated in her examination-in-chief that age of the deceased at the time of death was 39 years. In the evidence, Shri Madhav Kekane, the Personnel Officer of the employer of the deceased stated that in normal course the deceased would have retired in the year 1997 and at the time of reaching age of superannuation, his gross salary would have been more. He stated that deceased was getting gross salary of Rs.2,300/- per month at the time of accident. As noted earlier the date of the accident is 22nd December, 1981. The Appellant has stated in her cross-examination that her husband might be getting actual amount of approximately Rs.1,500/- per month as salary. In view of this admission the monthly salary will have to be taken at Rs.1,500/-. One third amount will have to be deducted on account of personal expenditure and thus multiplicand will be Rs.12,000/-. So far as multiplier is concerned, considering the fact that the age of the deceased was 39 years at the time of accident, multiplier of 11 will have to be applied. The usual sum of Rs.15,000/- will have to be awarded on account of loss of consortium etc. Thus, total compensation will be Rs.1,47,000/- inclusive of amount paid on account of no fault liability. The

Appellant will have to be paid interest at the rate 7.5% per annum on the said amount. So far as liability of the Insurance Company is concerned, there is a categorical statement by one Shri Suhas who was examined on behalf of the Insurance Company that the liability of the Insurance Company was restricted to Rs.50,000/- as the owner had not paid extra premium to cover unlimited liability. This fact is supported by the document at Exhibit 92 which shows that liability was only to the extent of Rs.50,000/-. There is no reason to discard this case made out by the Respondent No.3.

13. Before I part with the judgment, it will be necessary to refer to the stand taken by the Respondent No.3- Insurance Company as regards amicable settlement. The stand taken is that as a matter of policy there cannot be any settlement of an accident claim after the claim is dismissed by the Tribunal. The reason given for adopting the policy is that such compromise settlement proposals are subjected to critical scrutiny and an objection by the government auditors. It is stated that internal auditors of the Respondent No.3- Company has taken serious objection to any such compromise settlement proposals by the officers of the Respondent No.3 in cases where claim

has been dismissed by the Tribunal. The policy adopted by public sector undertaking like the Respondent No.3 is surprising. The said policy appears to be in conflict with section 89 of the Code of Civil Procedure, 1908 which was brought on the statute book by the Code of Civil Procedure (Amendment) Act, 1999. An appeal is a continuation of the original proceeding. If in deserving cases the Insurance Company can enter into settlement during the pendency of the original claim proceedings, there is no reason why in deserving cases the Insurance Company should not consider the proposal for amicable settlement even during the pendency of an Appeal. The amicable settlement can be beneficial to both the parties. The Insurance Company can save same amount towards interest and avoid expenditure on preferring an appeal to the higher court. The orders passed by the Tribunal are never final and are subject to appellate jurisdiction of this Court. In my view, the policy of the Insurance Company may adversely affect implementation of section 89 of the said Code. However, it being a policy matter, it is for the authorities of the Insurance Company to consider.

14. The Appeal must succeed in part. Accordingly, I pass the following order:

(i) First Appeal is partly allowed.

(ii) M.A.C. Application No.103 of 1982 is partly allowed. The Respondents are jointly and severally directed to pay a sum of Rs.01,47,000/- to the Appellant with interest thereon at the rate of 7.5% per annum from the date of filing of the Claim Petition till date of payment. However, the liability of the Respondent No.3-Insurance Company is restricted to Rs.50,000/- together with interest at the rate of Rs.7.5% per annum on the sum of Rs.50,000/-.

(iii) The Appellant will be entitled to proportionate costs from the Respondents throughout. However, liability of the Respondent No.3 to pay costs will be restricted to costs payable on Rs.50,000/-.

(iv) The Respondents are granted time of four months to comply with this order.

JUDGE